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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JONG JA JUN, Plaintiff and Appellant, v. CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT, Defendant and Respondent.	E056054 (Super.Ct.No. CIVDS1112258) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Reversed.

Alan Charles Dell'Ario, Alan Charles Dell'Ario; Panish, Shea & Boyle, Brian J. Panish and Rahul Ravipudi for Plaintiff and Appellant.

McCune & Harber, Stephen M. Harber and Barry Bookbinder for Defendant and Respondent.

Plaintiff and appellant Jong Ja Jun filed a wrongful death action after her son was struck and killed crossing a road to reach a school bus stop. She appeals after the trial

court sustained the demurrer of defendant and respondent Chaffey Joint Union High School District (the District), without leave to amend, to the negligence and dangerous condition of public property causes of action she had alleged against the District in her complaint.

We determine that the trial court improperly sustained the District's demurrer without leave to amend. We reverse.

FACTS AND PROCEDURAL HISTORY

Because the matter arises on demurrer, we take as true the facts alleged in the complaint, which is the operative pleading. On the morning of December 6, 2010, Jin Ouk Burnham (the decedent), plaintiff's son, was walking toward a bus stop on a school bus route established by the District. The complaint alleged that the decedent "lived on the south side of Duncan Canyon Road, whereas the bus stop . . . was located on the north side of Duncan Canyon Road." The bus stop in question was the only school bus stop near the decedent's home. At the intersection of Duncan Canyon Road (carrying east-west traffic) and Serrano Avenue (carrying north-south traffic), "there is no marked cross walk and no form of traffic control whatsoever to regulate vehicles traveling east and west," i.e., on Duncan Canyon Road. Duncan Canyon Road, at that location, is four lanes wide—two lanes in each direction—with a concrete median, and the posted speed limit is 40 miles per hour. To reach the bus stop, the decedent was crossing Duncan Canyon Road in an unmarked crosswalk at Serrano Avenue, when he was struck by a vehicle

driven by defendant Imelda Hughes. The decedent suffered catastrophic injuries and died 15 days later, on December 21, 2010.

As a result, plaintiff, the decedent's mother, filed the instant wrongful death action on October 24, 2011, naming as defendants the District, the City of Fontana (where the accident took place and the bus stop was located), the State of California (alleged to be one of the entities responsible for the roadway design), and Hughes, the driver of the vehicle that struck the decedent. The complaint alleged a cause of action for dangerous condition of public property against the public entities: the District, the City of Fontana (the City), and the State of California (the State). A second cause of action, for negligence, was also alleged against the public entities. The third cause of action, again for negligence, was alleged against the individual defendant, Hughes.

On or about December 9, 2011, the District demurred to the two causes of action alleged against it in the complaint. As to both causes of action, the demurrer asserted that the complaint failed to state facts sufficient to state a cause of action, and that the allegations were uncertain. Among other things, the District argued that it was immune from liability under Education Code section 44808, citing *Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863.

After several rounds of briefing and argument, the trial court ultimately sustained the demurrer without leave to amend, and dismissed the action as to the District on January 30, 2012. The District sent notice of the ruling to plaintiff on February 10, 2012.

Plaintiff filed a timely notice of appeal on April 6, 2012. Plaintiff elected to proceed by filing an appellant's appendix pursuant to California Rules of Court, rule 8.124.

ANALYSIS

I. Standard of Review on Demurrer

"On appeal, we review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. [Citations.] We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. [Citations.] However, we may disregard allegations which are contrary to law or to a fact of which judicial notice may be taken. [Citations.] [¶] We apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend. [Citations.] When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.] The appellant bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. [Citations.]" (*V.C. v. Los Angeles Unified School Dist*. (2006) 139 Cal.App.4th 499, 506-507.)

II. The Trial Court Erred in Sustaining the Demurrer

A. Erroneous Language in the Complaint Did Not Render the Causes of Action Fatally Uncertain

The key allegation of the complaint is that the decedent was "headed to a bus stop located on the subject roadway" when he was struck by a car and killed. The general allegations of the complaint define the "subject roadway" as including "the stretch of roadway *at the near the* intersection of Duncan Canyon Road and Serrano Avenue in San Bernardino County." (Italics added.)

The District's demurrer focused in large part on the confusing "at the near the" language quoted *ante*. The District contended that this error in phrasing rendered the complaint "hopelessly uncertain," because the issue whether the bus stop was actually *on* the roadway (i.e., on the major four-lane highway, Duncan Canyon Road), as opposed to *near* the roadway (i.e., not actually on Duncan Canyon Road), was critical to the issue of liability. Plaintiff had alleged that the District had violated title 13 of the California Code of Regulations, section 1238, subdivision (b)(3), which prohibits a school district from placing or designating a school bus stop "(3) *On* a divided or multiple-lane highway where pupils must cross the highway to board or after exiting the bus . . . ." (Italics added.) If, however, plaintiff had failed to properly allege that that the bus stop was actually on the four-lane highway, then the complaint was fatally uncertain. The District asserted that the complaint "does not allege precisely ***where*** the subject bus stop was located."

However, we reject this argument as to uncertainty. In the first place, the formatting of the confusing language is highly suggestive of a drafting error: the words "at the" appear at the end of line 23 on page 2, with the words "near the" appearing immediately after the line break, at the beginning of line 24. Any ambiguity can easily be removed and clarified by amendment to delete the redundant language. In the second place, either phrase—identifying the location at issue as including a "stretch of roadway *at the intersection* of Duncan Canyon Road and Serrano Avenue," or a "stretch of roadway *near the intersection* of Duncan Canyon Road and Serrano Avenue"—could be appropriate, and not necessarily either ambiguous or uncertain. Regardless of the phrase used, the context of the allegations in the complaint demonstrates that the location of the bus stop is on the subject roadway, and is clearly intended to refer to Duncan Canyon Road, the four-lane highway, and not to Serrano Avenue or any other street. The identification of the intersection (i.e., "near the intersection of Duncan Canyon Road and Serrano Avenue) is relevant to explain that the decedent was using an unmarked crosswalk, uncontrolled by traffic signals, in order to reach the bus stop on Duncan Canyon Road. Thirdly, other portions of paragraph 3 of the complaint make these facts specific and unambiguous. The detailed allegation states: "Decedent lived on the south side of Duncan Canyon Road, whereas the bus stop for the subject bus route was located on the north side of Duncan Canyon Road." There can be no question that the complaint intended to allege, and in fact does allege, that the bus stop was located on Duncan Canyon Road, in a prohibited location.

To help clear up the matter, plaintiff filed a motion in this court, to take judicial notice of deposition testimony and of a map of the intersection, "to demonstrate the good faith basis of her allegations." By order filed June 6, 2013, we reserved decision on the judicial notice request for consideration with the appeal. Because we have accepted, for demurrer purposes, the allegation that the bus stop was on the north side of Duncan Canyon Road, the motion to take judicial notice is denied as irrelevant. We are satisfied, under the appropriate standard of review—reading the complaint as a whole and with all its parts in context—that plaintiff properly alleged that the designated bus stop was actually located on Duncan Canyon Road, a four-lane highway, and that this allegation is sufficient to raise the problem of compliance with California Code of Regulations, title 13, section 1238, subdivision (b)(3).

This determination, for purposes of demurrer, is without prejudice to evidence that may be adduced for purposes of trial or on a motion for summary judgment. Here, we are limited to an examination of the actual allegations of the complaint before us. Should plaintiff amend the complaint on remand, our ruling naturally does not purport to predetermine the sufficiency, or lack thereof, of any matters not encompassed by the pleading presently under review.

B. The Trial Court Erred in Finding Immunity Under Education Code Section 44808 and *Bassett v. Lakeside Inn* for a Dangerous Condition of Public Property

As noted, the complaint alleged that Duncan Canyon Road is a four-lane divided road running east to west. At the intersection with Serrano Avenue, there was no marked

crosswalk and no form of traffic control at the time of the accident. We accept the allegation of the complaint that the bus stop was located on the north side of Duncan Canyon Road. The decedent, who lived on the south side of Duncan Canyon Road, had to cross the road to reach the bus stop. While doing so in the unmarked crosswalk, at the uncontrolled intersection with Serrano Avenue, he was struck and killed by a car driven by defendant Hughes.

The two causes of action alleged against the District[1] were for a dangerous condition of public property and for negligence. The first cause of action alleges a dangerous condition of public property. Specifically, it alleges that the placement of the school bus stop was on a multi-lane highway, without a controlling traffic officer or signal, in violation of California Code of Regulations, title 13, section 1238, subdivision (b)(3).[2] As a result of the alleged violation, the bus stop is assertedly a dangerous and unsafe condition of public property. Other defects in the highway were

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[1] The remaining defendants listed in the complaint—Imelda Hughes, City of Fontana, and the State of California—are not parties to this appeal.

[2] The relevant regulation provides that school bus stops shall be designated by the school district superintendent (Cal. Code Regs., tit. 13, § 1238, subd. (a)), but that bus stops are prohibited in certain locations (Cal. Code Regs., tit. 13, § 1238, subd. (b)): "(b) Prohibited Stops. A school bus stop shall not be designated at the following locations: [¶] . . . [¶] (3) On a divided or multiple-lane highway where pupils must cross the highway to board or after exiting the bus, unless traffic is controlled by a traffic officer or official traffic control signal. For the purposes of this subsection, a multiple-lane highway is defined as any highway having two or more lanes of travel in each direction."

also alleged. All of the defects are alleged to have caused the accident and the decedent's death.

The second cause of action alleges that the public entity defendants were negligent in establishing the bus stop in violation of California Code of Regulations, title 13, section 1238, subdivision (b)(3), and the negligence was a proximate cause of the decedent's death. The complaint requested damages in accordance with Code of Civil Procedure section 377.34.[3] Both causes of action rely on the same alleged wrongful or negligent conduct: designating a school bus stop in a location specifically prohibited by regulation, without making the undertaking (providing a traffic officer or traffic controls) required to render the bus stop safe.

The District's demurrer alleged that the complaint failed to state facts sufficient to state a cause of action, and that it was uncertain. The District also asserted the immunity of Education Code section 44808,[4] as interpreted by *Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th 863.

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[3] Code of Civil Procedure section 377.34 is a provision limiting the damages recoverable in a cause of action on behalf of a decedent, to exclude damages for pain and suffering.

The complaint also contains an allegation that a bus stop was added after the accident. However, Government Code section 830.5 provides that subsequent actions are not evidence of a dangerous condition at the time of the injury.

[4] All further statutory references are to the Education Code unless otherwise indicated.

The uncertainty ground, discussed *ante*, attacked the imprecision of the definition of the "subject roadway," arguing that the allegations were uncertain because there are substantial legal differences depending on the precise location of the bus stop. That is, if the bus stop was not on the four-lane highway (Duncan Canyon Road), then the regulation prohibiting designation of a bus stop on a four-lane highway would not come into play. However, we have disposed of the uncertainty argument, based on the "at the near the" redundant language, in favor of a clear and common-sense construction of all the allegations of the complaint; those allegations plainly intended to state that the bus stop was in a prohibited location, on a four-lane roadway (the north side of Duncan Canyon Road), without the required safety measures in place.

Under the regulation, if the District wished to designate its bus stop on Duncan Canyon Road, it was required to provide a traffic officer or a signal to control traffic. Plaintiff argued that the decedent should have been under direct supervision as part of the District's undertaking to provide transportation. Plaintiff pointed out that Education Code section 45450 expressly authorizes the District to hire crossing guards.

The District asserted below, however, that section 44808 provided it immunity from liability for failing to supervise students like the decedent off the school grounds. It also relied on *Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th 863 to support its claim of immunity, in a similar case involving an alleged dangerous school bus stop. The trial court found that section 44808 was dispositive, also relying on *Bassett*. We turn next to an examination of the questions whether the allegations of the complaint were

sufficient to assert liability for a dangerous condition of public property, and then whether the District was nevertheless immune from liability under section 44808.

1. The Allegations of the Complaint Were Sufficient to State a Cause of Action for a Dangerous Condition of Public Property

Public entities are generally immune from liability for tort injury, "[e]xcept as otherwise provided by statute." (Gov. Code, § 815.) The District's liability for the decedent's injury in this case must therefore be based on some statutory authority. Here, the relevant provisions are Government Code sections 830 and 835, which provide a statutory basis for liability, if a public entity creates or maintains a dangerous condition of public property. Government Code section 835, provides that a public entity may be liable for an injury caused by the dangerous condition of its property, "[e]xcept as provided by statute[.]" A "'[d]angerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably forseeable that it will be used." (Gov. Code, § 830, subd. (a).)

Here, it is alleged that the District designated a bus stop on the north side of Duncan Canyon Road, a four-lane highway with a concrete median, and placed the bus stop near an uncontrolled intersection, so that pupils like the decedent who wished to use the bus stop, and who did not live on the north side of the roadway, were required to cross the four-lane highway, without benefit of either a traffic officer or other traffic controls. The highway has a posted speed limit of 40 miles per hour. There was no other

school bus stop near the decedent's home. The features of Duncan Canyon Road—four lanes, with two lanes of traffic in each direction, and a center concrete median—meet the definition in California Code of Regulations, title 13, section 1238, subdivision (b)(3), of a "multiple-lane highway" or a "divided highway." The regulation prohibits designating a bus stop on such a roadway when two other conditions exist: pupils must cross the road to use the bus stop, and no traffic officer or traffic controls are provided.

Assuming, as we must, that the allegations in the complaint are true, and giving the complaint a reasonable interpretation, construing all its provisions together as a whole, we have independently determined, at least preliminarily, that plaintiff has properly stated a cause of action for a dangerous condition of public property. That is, the bus stop was designated on a multiple lane highway or divided highway, pupils like decedent were required to cross the highway to use the bus stop, and there were no traffic controls or traffic officer provided. Presumably, the regulation prohibits such bus stops precisely because they are dangerous.

We have not yet, however, taken account of the effect of section 44808. This we now proceed to do.

2. Section 44808 Does Not Provide Immunity From Liability for the Alleged Dangerous Condition of Public Property (Designation of the School Bus Stop in a Prohibited Location), Because the District Was Obligated to Provide Supervision of Pupils Using the Bus Stop, in the Absence of a Traffic Control

Section 44808 is a provision limiting liability of a school district when pupils are not on school property: "Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. [¶] In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board."

The first sentence of section 44808 states a general rule of nonliability for student safety or conduct whenever the student is *not* on school property. It then states an exception: "unless such district . . . has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the

premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances." Here, the District had undertaken to provide transportation for pupils to and from the school premises, and had created bus routes and designated bus stops, like the bus stop on Duncan Canyon Road, for that purpose. Even when a school district has undertaken the activities which could give rise to liability, however, the last sentence of section 44808 provides an additional limitation: "In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil *only* while such pupil is or should be under the immediate and direct supervision of an employee of such district or board." (Italics added.)

Because there is, assertedly, no allegation here that the decedent was injured on school property, or that the decedent was under the supervision of a District employee at the time of the accident, the trial court found that the immunity defense applied. In so doing, the trial court relied on *Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th 863 in construing section 44808 to provide immunity. We next examine *Bassett* and its interpretation of section 44808.

In *Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th 863, a student was killed while crossing the road at a crosswalk, on her way to her first day of high school. The student's parents filed a wrongful death action against the drunk driver who killed their daughter, against the establishment that had served drinks to the drunk driver, and against the school district, among others. The theory of liability against the school district was

based on the school district's designation of a school bus stop at the intersection where the student had been crossing, and on the alleged dangerousness of the intersection where the school district had designated the bus stop. (*Id*. at pp. 866-867.) The school district had demurred to the plaintiffs' third amended complaint, asking the court to take judicial notice that it did not own the public property where the accident had occurred. The trial court sustained the demurrer without leave to amend. (*Id*. at p. 867.)

"The Bassetts' theory of the [school district's] liability was that the [school district] had designated a dangerous location for its schoolbus stop. The third amended complaint alleged that the intersection at 15th Street and Eloise Avenue had no traffic control signs. This absence together with the presence of such signs on nearby streets and highways prompted local motorists to use 15th Street as a shortcut to Highway 89 at unsafe speeds. There was an S-curve just before the intersection that distracted drivers and discouraged them from focusing on the intersection; it positioned them so their line of sight of the intersection was obscured by trees. The presence of a residential structure also obscured the line of sight, making it difficult to discern the intersection ahead, and distracted drivers, making it difficult or impossible to see pedestrians in or near the intersection. The presence of a pathway encouraged pedestrians to use the northwest portion of the intersection at a location where it was difficult for motorists to see them. The [school district's] designation of a schoolbus pickup point where the pathway meets the intersection 'encouraged and enticed' students to use the intersection at a point where it was difficult for drivers to see pedestrians.

"The trial court sustained the [school district's] demurrer without leave to amend on the basis that there was no evidence the [school district] owned or controlled the bus stop and the [school district] had immunity under Education Code section 44808." (*Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th at p. 868.)

Part of the issue in *Bassett* was whether the school district owned or operated the site of the school bus stop. The appellate court noted, "Liability under Government Code section 835 applies only where the public entity owns or controls the property. (Gov. Code, § 830, subd. (c).) The [school district] argues, and the trial court found, that the [school district] did not own or control the bus stop. The [school district] apparently established, through judicial notice, that it [also] did not own the crosswalk or the property on which the bus stop was located . . . ." (*Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th at p. 869.) The appellate court stated, however, that actual ownership of the public property was "not the issue. The [school district's] superintendent has authority to designate the location of the schoolbus stop. (Cal. Code Regs., tit. 13, § 1238, subd. (a).) That power may be sufficient to constitute ownership or control of the bus stop for purposes of Government Code sections 830 and 835. (See *Bonanno v. Central Contra Costa Transit Authority* [(2003)] 30 Cal.4th [139] at p. 151 [determining transit authority 'owned and controlled its own bus stop' when it had power, subject to county's veto, to remove it].)" (*Ibid*.) The *Bassett* court therefore recognized that a school district's power to designate the location of a school bus stop could be a sufficient

allegation of ownership or control to state a claim for dangerous condition of public property.

There was, however, another problem with the pleading in *Bassett*: assertedly, there was "no allegation the designation of the schoolbus pickup spot caused or contributed to the accident. In the original, the first amended, and the second amended complaints, the Bassetts alleged their daughter was struck and killed 'as she traversed a crosswalk on her way to a school bus pickup area.' In the third amended complaint, the operative one for the [school district's] demurrer, this allegation is deleted. The complaint merely alleges the Bassetts' daughter was crossing the street on her way to school. There is no allegation that she intended to take the bus. Generally, '[a]n amended complaint "supersedes the original and furnishes the sole basis for the cause of action. [Citations.] The original complaint is dropped out of the case and ceases to have any effect as a pleading, or as a basis for a judgment. [Citation.]"' [Citation.]" (*Bassett v. Lakeview Inn, Inc.*, *supra*, 140 Cal.App.4th at pp. 869-870.) The appellate court determined, however, that that issue could be resolved by amending the pleading: "At oral argument . . . counsel for plaintiffs stated the complaint could be amended to state that Marissa was on her way to the schoolbus stop and intended to take the bus to school. In considering whether there is a reasonable probability a defect in the complaint could be cured by amendment, courts may consider counsel's statements at oral argument. [Citations.] Accordingly, the complaint could be amended to allege the [school district's] location of the schoolbus stop was a dangerous condition of public property and Marissa

was using the bus stop, crossing the street to reach it, when she was killed." (*Id*. at p. 870.)

The situation in *Bassett* was therefore approximately parallel to the situation here. In both cases, a pupil of the relevant school district was approaching a designated school bus stop, presumably to board a bus to school. Here, the decedent was in an unmarked crosswalk; in *Bassett*, the student was alleged to be "travers[ing] a crosswalk" near the bus stop, but it is not clear from that recitation whether the crosswalk was marked or not. In both cases, the pupil crossed at an intersection near a designated bus stop, and was killed while in the intersection crosswalk, when struck by a motorist. In both cases, the bus stop was alleged to be in a dangerous location. In both cases, the theory of liability—a dangerous condition of public property—was predicated on the school district's power and control over the designation of its bus stops. (Cal. Code Regs., tit. 13, § 1238, subd. (a).) In both cases, at least preliminarily, the allegations of the operative pleading (or reasonable amendments to the allegations) were sufficient to allege a dangerous condition of public property as against the relevant school district.

In both cases, the next part of the analysis hinges upon the applicability of the immunity provided in section 44808. The *Bassett* court stated: "A school district's liability, however, is limited by Education Code section 44808 (section 44808)," and recited the statutory language we have quoted *ante*. (*Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th at p. 870.) "'Under Education Code section 44808, the [school district] would not be liable for injuries off campus and after school unless they were the result of

the [school district's] negligence occurring on school grounds or were the result of some specific undertaking by the [school district], which was then performed in a negligent manner." (*Mosley v. San Bernardino City Unified School Dist*. (2005) 134 Cal.App.4th 1260, 1264 [36 Cal.Rptr.3d 724].) 'In essence, the section grants a district immunity unless a student was (or should have been) directly supervised during a specified undertaking.' [Citation.] The portion of section 44808 that refers to failing to exercise reasonable care does not create a common law form of general negligence; it refers to the failure to exercise reasonable care during one of the mentioned undertakings. [Citation.]" (*Id*. at pp. 870-871.)

Both *Bassett* and this case involve "one of the mentioned undertakings," i.e., an undertaking to provide transportation for pupils to and from school. In *Bassett*, the parents "contend[ed] that section 44808 does not provide immunity because the [school district] undertook to provide transportation to the school and 'failed to exercise reasonable care under the circumstances' in designating the location of the bus stop." (*Bassett v. Lakeside Inn, Inc., supra*, 140 Cal.App.4th at p. 871.) The Bassetts relied on *Joyce v. Simi Valley Unified School Dist*. (2003) 110 Cal.App.4th 292 "in which a student was seriously injured when she was struck by a car while crossing the street to enter the school grounds through an open school yard gate. The [school district in that case] argued it was immune under section 44808 because it had no duty to supervise students going to and from school. The court held there was no immunity under section 44808 because liability was not based on lack of supervision, but on 'an open gate that enticed

children to cross an adjacent dangerous intersection.' (110 Cal.App.4th at p. 301.)" (*Bassett v. Lakeside Inn, Inc.*, at p. 871.) In *Joyce*, therefore, the liability was based on a dangerous condition of actual school property, i.e., the enticing open gate, which caused children to use nearby dangerous property to access the school grounds.

The *Joyce* court relied, in turn, on *Hoyem v. Manhattan Beach City Sch. Dist*. (1978) 22 Cal.3d 508, 517. The *Bassett* court described the relationship of the *Hoyem* case to the issue of section 44808 immunity: "In *Hoyem*, a student left school without permission during the schoolday and was injured by a motorist. The child and his mother sued the school district alleging negligent supervision. The trial court sustained the defendant's demurrer and dismissed the case. [Citation.] [¶] The Supreme Court reversed, finding a school district has a duty to supervise students while on school premises and may be liable for failure to exercise reasonable care in that supervision. [Citation.] The court rejected the argument that the school district was immune under section 44808. First, noting that section 44808 grants a school district immunity for injuries to students not on school property, the court stated: 'the section goes on explicitly to withdraw this grant of immunity whenever the school district, inter alia, "*has failed to exercise reasonable care under the circumstances*."' [Citation.] In a footnote, the court noted the reasonable care exception was not accidental, but added by Senate amendment. 'The intent of the Legislature is clear: when a school district fails to exercise reasonable care the immunity of this section evaporates.' [Citation.]" (*Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th at pp. 871-872, fn. omitted.) The *Bassett*

court pointed out, however, that the expansive statements in *Hoyem* had not been followed since then: "While the language of *Hoyem* could be read to withdraw immunity whenever a school district fails to exercise reasonable care, it has not been so interpreted since. [Citations.] Indeed, the *Hoyem* court explained, 'defendant's liability in this case is posited not on an alleged failure to supervise [the student] when he was off the school premises, but rather on an alleged failure to exercise due care *in supervision on school premises*.' (*Hoyem*, *supra*, 22 Cal.3d at p. 523, original italics.) Thus, *Hoyem*, consistent with the language of section 44808, withdraws immunity only when the student is or should be under the school's direct supervision. To the extent *Joyce v. Simi Valley United School Dist.*, *supra*, 110 Cal.App.4th 292, seeks to withdraw section 44808 immunity when there is a dangerous condition of property, regardless of whether the injured student was or should have been supervised, we respectfully disagree and decline to follow it." (*Id*. at p. 872.)

The *Bassett* court then concluded, "Since Marissa was injured not on school property and not while she was or should have been under the direct supervision of the school, section 44808 applies and the [school district] has immunity. The trial court did not err in sustaining the [school district's] demurrer without leave to amend." (*Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th at p. 872.) The import of *Bassett*, and the cases discussed therein, is that a school district's liability under section 44808 for injury to a student off school property depends upon whether the student "was or should have been under the direct supervision of the school." (*Ibid*.) When a school district's liability

is predicated upon one of the described undertakings in section 44808, the immunity will apply if the school district should have, but failed to, provide proper supervision in connection with the activity for which the school district made such a special undertaking.

In *Bassett*, as here, the school district *had* undertaken to transport pupils to and from school. The issue then becomes, was there a duty, as a result of that undertaking, to supervise the pupils using the bus stop? In *Bassett*, the court found no such duty. The factual allegations in that case established that the "dangerous condition of public property," i.e., the assertedly dangerous location of the designated bus stop, was not based on alleged violation of California Code of Regulations, title 13, section 1238, subdivision (b), placement of the bus stop in a prohibited location. Rather, the dangerous condition of the bus stop was predicated on such factors as the shape of the roadway (S-curve with a blind spot), a residential building nearby that blocked sight lines and distracted drivers, trees obscuring the view, the existence of other traffic controls on other streets, which encouraged drivers to use the allegedly dangerous intersection as a short-cut, and other circumstances. There was no assertion, as there is here, that the allegedly dangerous placement or designation of the bus stop was actually in a prohibited location, triggering a duty to supervise. *Bassett* is distinguishable on that basis from the present case.

Here, by contrast, the bus stop *was* alleged to be placed in violation of the regulation, on a major four-lane roadway and/or divided highway with a concrete median.

In such circumstances, California Code of Regulations, title 13, section 1238, subdivision (b)(3), prohibited placing the bus stop in the designated location, unless the District provided either a traffic officer, or traffic controls. As plaintiff has pointed out, section 45450 authorizes the District to hire crossing guards. In the absence of a traffic control, it was the District's obligation under the regulation to provide supervision, and it had the power to do so, via its hiring authority.

Bassett does not stand for a general proposition that a school district is immune from liability under section 44808 for a dangerous condition of public property with respect to school bus stops, which are off-campus locations. Instead, the applicability of the immunity turns on whether or not there was an obligation to provide supervision with respect to the specified undertakings described: providing transportation to pupils to and from school, sponsoring an off-premises activity, or otherwise specifically assuming responsibility or liability for students off the school premises. (§ 44808.) If a school district has made any of the specified undertakings, then it is liable (i.e., not immune) "for the conduct or safety of any pupil *only* while such pupil is or should be under the immediate and direct supervision of an employee of such district or board." (*Ibid*., italics added.) Here, the complaint alleged that the District *was* obligated to provide direct supervision of pupils like the decedent, because it had made one of the specified undertakings—to provide transportation to pupils—and under the regulations for such transportation (designating bus stops), it was required to provide either a traffic officer (direct supervision) or a traffic control if it designated a school bus stop in a prohibited

location. The complaint clearly alleged that there was no traffic control; consequently, the District was under obligation to provide supervision.

C. Conclusion: The Trial Court Erred in Sustaining the Demurrer

To summarize: The confusing "at the near the" redundant language in the complaint did not render the allegations of the complaint fatally uncertain. The complaint clearly intended to, and did, allege that the bus stop was actually located on Duncan Canyon Road, and that the designation of the bus stop in that location violated California Code of Regulations, title 13, section 1238, subdivision (b)(3). The allegations of the complaint were sufficient to show that the school bus stop had been placed in a prohibited location and, under the regulation, the District had an obligation to provide a traffic officer (direct supervision) in the absence of a traffic control; the allegations also made clear that there was no traffic control at the intersection where the accident took place. The complaint made factual allegations sufficient to show that the bus stop constituted a dangerous condition of public property, in general, and that the immunity of section 44808 did not apply, because the decedent should have been under supervision at the time of the accident.[5]

Because plaintiff properly alleged facts to show both that the location of the bus stop constituted a dangerous condition of public property, and that the immunity of

[5] Plaintiff's negligence cause of action is predicated on the identical facts and conduct. Because the dangerous condition of public property cause of action survives demurrer—i.e., the allegations were sufficient to defeat the immunity of section 44808—the negligence cause of action survives also.

section 44808 did not apply, the trial court erred in sustaining the demurrer, and particularly in doing so without leave to amend. The trial court's reliance on *Bassett v. Lakeside Inn, Inc.*, *supra*, 140 Cal.App.4th 863, was misplaced. *Bassett* did not create a general rule of immunity under section 44808 with respect to all causes of action concerning school bus stops. Rather, the immunity applied in that case because the plaintiffs alleged nothing to show that the school district had a duty to supervise the students using the bus stop. Here, unlike in *Bassett*, a regulation applied that did impose a duty on the District to supervise students using the bus stop in the allegedly dangerous location.

III. The Trial Court Abused Its Discretion in Refusing Leave to Amend

Although we have held, as a primary matter, that the trial court erred in sustaining the demurrer, we have noted or identified some areas in which amending the pleadings would provide more clarity and certainty. The allegation that the "subject roadway," where the bus stop was located, was "at the near the" intersection of Serrano Avenue, is plainly mistaken. There is a reasonable possibility that the allegation may be corrected by amendment to cure the defect in the allegation, to delete the redundant words. The complaint might also reasonably be amended to make clear and certain the actual placement of the bus stop on the major roadway (Duncan Canyon Road), in a prohibited location. We have taken the purport of all the allegations together to conclude that is what the complaint presently actually does allege, but it would be an abuse of discretion to deny leave to amend, if such amendment could further clarify the matter. (See *Zelig v.*

County of Los Angeles (2002) 27 Cal.4th 1112, 1126 [when a demurrer is sustained without leave to amend, the reviewing court determines whether there is a reasonable possibility that the defect can be cured by amendment; if it can be, the trial court has abused its discretion in refusing leave to amend].)

DISPOSITION

The judgment of dismissal after an order sustaining a demurrer is reversed. Plaintiff and appellant should also be afforded an opportunity to amend the complaint, consistent with the principles set forth in this opinion. Plaintiff and appellant shall recover her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

KING
J.

MILLER
J.